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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958.

**No. 793**

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

*Appellant,*

*vs.*

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

*Appellees.*

## MOTION OF APPELLEE, MILWAUKEE ROAD COMMUTERS' ASSOCIATION, TO AFFIRM THE ORDER OF THE DISTRICT COURT FROM WHICH THIS APPEAL IS TAKEN,

## AND

## BRIEF OF APPELLEE IN SUPPORT OF THE MOTION.

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THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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*vs.*

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

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---

## MOTION OF APPELLEE, MILWAUKEE ROAD COMMUTERS' ASSOCIATION, TO AFFIRM THE ORDER OF THE DISTRICT COURT FROM WHICH THIS APPEAL IS TAKEN.

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Appellee, Milwaukee Road Commuters' Association, moves that the order of the District Court entered December 24, 1958, from which the appeal in this case was taken, be affirmed for the reasons that: (1) the order appealed from is in accord with the law of this case; and (2) the questions raised by appellant are so unsubstantial as not to need further argument.

S. ASHLEY GUTHRIE,
FRANCIS D. FISHER,
*Attorneys for Milwaukee Road Commuters' Association.*

## BRIEF OF APPELLEE IN SUPPORT OF THE FOREGOING MOTION.

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### STATEMENT OF THE CASE.

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#### The Nature of the Case.

This is the third appeal to the Supreme Court taken by appellant (herein referred to as "the Milwaukee Road") in this case.

The present appeal is from an order of a three-judge District Court entered December 24, 1958, denying the motion of the Milwaukee Road that "the unclaimed balance" of a fund in Court consisting of certain impounded excess fares, be paid to the Milwaukee Road instead of being applied first to the payment of plaintiffs' attorneys' fees and other expenses in this litigation, as directed in the order creating the fund (herein referred to as "the impounding order").

As shown below the same question was raised by the Milwaukee Road on its motion of February 10, 1958, asking the Court to disregard the provision of the impounding order requiring refund of the impounded excess fares to the commuters applying therefor, and was decided adversely to the Milwaukee Road by the District Court's order of February 28, 1958, denying that motion.

We submit that the order of February 28, 1958, last referred to, is clearly decisive of the issue here raised. But even if that issue were now raised for the first time, there

ould be no substantial question as to the binding effect f the impounding order (agreed to by all parties at the ime it was entered) on the disposition of the fund created ursuant to that order.

### The Provisions of the Impounding Order and the Circumstances Under Which It Was Entered.

The impounding order was entered by a three-judge District Court under the following circumstances:

On June 14, 1956, the District Court entered a decree (1) declaring invalid an order of the Interstate Commerce Commission which directed an increase in the Milwaukee Road's Illinois intrastate fares; and (2) enjoining collection of the excess fares as directed by that order.

The Milwaukee Road filed notice of appeal from that decree. Thereafter, on June 18, 1956, on motion of the Milwaukee Road, and by agreement of the parties, the District Court entered the impounding order staying the injunction against the collection of the excess fares during pendency of the appeal, on condition that the excess fares collected be impounded by the Milwaukee Road, and that upon determination of the case on appeal, the impounded excess fares be disposed of as follows (See Appendix D to Juris, Stmt. pp. 24a-25a):

"• • •

3. If the decree is reversed and injunction dissolved, the Milwaukee Road shall retain the impounded excess fares and may transfer them to its general funds.

4. If the decree is affirmed or the appeal is dismissed or discontinued, the Milwaukee Road shall post immediately in its suburban stations, notice that refund will be made of the excess fares to the persons who have paid them.

5. Six months after the posting of such notice, the Milwaukee Road shall file a report in this court setting forth the total amount of the excess fares impounded,

the total amount of refunds made therefrom, and the balance of the impounded excess fares then unclaimed. At the same time, the Milwaukee Road shall deposit with the Clerk of this Court the amount of such unclaimed balance.

6. Thereupon, upon petition of plaintiffs, and evidence showing reasonable expenses (including reasonable attorneys' fees) incurred by each of the plaintiffs in the proceeding before the Interstate Commerce Commission, reviewed in this case, in prosecuting this case in this Court, and in connection with the appeal from the decree herein, the Court shall order that the amount of said reasonable expenses shall be paid to plaintiffs from the unclaimed balance of the impounded excess fares. Any remaining balance shall be retained by the Clerk subject to such disposition as this Court may direct.

* * *."

The decree of the District Court was affirmed by the Supreme Court on January 13, 1958 (*C. M. & St. P. R. Co. v. Illinois*, 355 U. S. 300). On affirmance of the decree, and under the above-quoted provisions of the impounding order, the Milwaukee Road was obligated to proceed immediately (1) to make the specified refunds to commuters applying therefor; and (2) to deposit any unclaimed balance with the Clerk of the District Court to be applied first in payment of plaintiffs' (appellees') expenses and then as the Court might direct.

THE ORDER OF FEBRUARY 28, 1958, REQUIRING REFUND OF THE IMPOUNDED EXCESS FARES AS PROVIDED IN THE IMPOUNDING ORDER.

The Milwaukee Road sought to avoid the obligation thus imposed upon it by the impounding order, and on February 10, 1958, following the affirmance of the decree, filed a motion in the District Court asking for leave to retain the impounded fund pending disposition of further proceedings

before the Interstate Commerce Commission, and subject to further order of court at the conclusion of those proceedings. The motion was denied by the District Court on February 28, 1958 and the Milwaukee Road was directed to proceed immediately with the refund.

Attached hereto, as Appendices 1, 2 and 3 respectively (pp. 17 *et seq.* below) are copies of the motion, extract from the transcript of proceedings thereon, and order of the District Court of February 28, 1958 denying the motion.

An appeal to the Supreme Court was taken from the order denying the motion; an application for supersedeas staying the order pending appeal was made to the three-judge District Court and denied; and a like application for supersedeas was made to the Supreme Court and was also denied (*C. M. & St. P. R. Co.* v. *Illinois*, 356 U. S. 906). Later, in May, 1958, the appeal to the Supreme Court was dismissed for want of prosecution.

The District Court's order of February 28, 1958, requiring compliance with the provisions of the impounding order as to disposition of the impounded fund, thus stands as a final order, conclusive in this case, on the question involved in the present appeal.

THE REFUNDS TO COMMUTERS APPLYING THEREFOR, AND DEPOSIT OF THE UNCLAIMED BALANCE WITH THE CLERK OF THE DISTRICT COURT.

Upon denials of the motion for supersedeas, staying the order of February 28, 1958, the Milwaukee Road was required to, and did, comply with the provisions of that order, and proceeded with the refunds as required thereby.

After a six-month interval, and again pursuant to the impounding order, the Milwaukee Road filed its report showing completion of the required refunds to the qualified applicants therefor, and showing an unclaimed balance

on hand of $229,565. The unclaimed balance was deposited with the Clerk of the District Court as required by the impounding order.

THE ORDER OF DECEMBER 24, 1958, HERE APPEALED FROM DIRECTING DISPOSITION OF THE UNCLAIMED BALANCE AS SPECIFIED IN THE IMPOUNDING ORDER.

Under the impounding order, the unclaimed balance so deposited with the Clerk of Court was held in trust to be used first to pay the expenses incurred by plaintiffs in the litigation, and then as the Court might direct.

The Milwaukee Road, however, again attempted to set aside the provisions of the impounding order, and filed a motion asking that all funds on deposit be paid to the Milwaukee Road.

The District Court denied that motion, and on December 24, 1958, entered an order* directing that the unclaimed balance in the impounded fund be applied as provided in the impounding order: (1) in payment of plaintiffs' (appellees') expenses, the amounts of which were to be determined by the Court on evidence presented; and (2) that any remaining balance be paid over to the Milwaukee Road.

The present appeal is from that order of December 24, 1958.

The issue raised on the appeal is the same as that raised by the motion of February, 1958, wherein the Milwaukee Road sought to be relieved of the obligation to make the refund of excess fares to the commuters paying them, and decided by the order of February 28, 1958 denying that motion.

In both instances, the question involved is whether the

* Note: See Appendices A and B to Juris. Statement, reported in *Illinois* v. *United States*, 168 Fed. Supp. 706.

provisions of the impounding order providing for disposition of the impounded fund are binding. The order of February 28, 1958 holds that those provisions are binding and is conclusive in this case.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION OF OCTOBER 31, 1958—ITS VACATION AND ABSENCE OF EFFECT IN THIS CASE.

The only new matter referred to in the Jurisdictional Statement on the pending appeal is the entry by the Interstate Commerce Commission of a new order of October 31, 1958 (Juris. Statm't. pp. 21a-22a) directing an increase in the Illinois intrastate fares of the Milwaukee Road.

That order has no present effect.

On April 4, 1959, after the Jurisdictional Statement herein was filed, the order was vacated by the Interstate Commerce Commission because the Illinois Commerce Commission had entered an order approving and putting into effect on February 6, 1959, a schedule of increased fares, theretofore filed with the Illinois Commission by the Milwaukee Road.

While the order of the Interstate Commission vacating its prior order of October, 1958, also stated that the theretofore pending motion of this appellee for reconsideration of the October order was overruled, that part of the vacating order had and has no effect. The order of October, 1958 is no longer in existence, so that there is nothing to which the motion for reconsideration could apply.

But even if the October order of the Interstate Commerce Commission had not been vacated, it is not retroactive in its operation. By its terms, it was to go into effect on February 6, 1959. It could not validate or make effective the prior order of the Commission or alter the binding effect of the District Court's impounding order as to the

disposition of the impounded fund. The fact that the impounding order must be complied with (irrespective of prospective further proceedings before the Interstate Commerce Commission) was determined by the order of February 28, 1958 (as to which supersedeas was denied and the appeal was ultimately dismissed) insofar as it required refunds to commuters.

There is no basis for a different ruling as to the binding effect of the remaining provisions of the impounding order relating to the disposition of the unclaimed balance of the fund.

# ARGUMENT.

## I.

## THE ISSUES RAISED ON THIS APPEAL HAVE BEEN PREVIOUSLY DETERMINED AND ARE THE LAW OF THIS CASE.

### A.

THE RIGHTS IN THE IMPOUNDED FUND WERE SETTLED BY THE IMPOUNDING ORDER OF JUNE 18, 1956, WHICH ORDER IS NOT SUBJECT TO REVIEW.

This is not a case where money was held or set aside to be disposed of as the Court might determine in the future. The impounded fund of excess fares was collected under the terms of an order entered by the District Court on June 18, 1956 at the time of the first appeal to the Supreme Court.

The impounding order of June 18, 1956 provides in specific detail just what is to be done with the impounded excess fares upon affirmance of the District Court decree.

The impounding order provides that the Milwaukee Road must first refund the excess fares to all persons who paid them and who applied for refund within six months. That has been done.

The impounding order provides that at the conclusion of the six month period the balance of the impounded fares must be deposited with the Clerk of the District Court. That has been done.

The impounding order then provides: that plaintiffs are

to present to the District Court petitions and evidence "showing reasonable expenses (including reasonable attorneys' fees)" in connection with the case; and then that

> "* * * The Court shall order that the amount of said reasonable expenses shall be paid to plaintiffs from the unclaimed balance of the impounded excess fares."

The right of plaintiffs (appellees) to have their expenses paid from the unclaimed balance is thus clearly and finally fixed by self-executory provisions of the impounding order.

The impounding order was entered on the motion of the Milwaukee Road and its terms were consented to by the Milwaukee Road. The authority of the Milwaukee Road to continue to collect the excess fares was granted on the express condition that the impounded funds would be disposed of as provided in the impounding order. No appeal was taken from the impounding order—nor could have been, since it was an agreed order. Its provisions as to the right of plaintiffs to have their expenses paid from the unclaimed excess fares are not subject to review by the District Court and cannot be altered on this appeal.

## B.

### The Question Whether the June 18, 1956 Impounding Order Could Be Modified Was Decided Against the Milwaukee Road by Order of the District Court of February 28, 1958 Which Became Final When the Appeal from That Order Was Dismissed.

On February 10, 1958, after the decision by the Supreme Court affirming the District Court decree, the Milwaukee Road asked the District Court to relieve it of the obligation imposed by the impounding order to make refunds to commuters and to permit the Milwaukee Road to continue the impounding of the excess fares

> "for a period of 120 days or such other reasonable time as may be required to permit the I. C. C. to conduct further proceedings and make supplemental findings not inconsistent with the opinion of the Supreme Court of the United States entered on appeal of this matter on January 13, 1958." (Appendix 1, p. 17 below.)

The Milwaukee Road then argued that some future order of the Interstate Commerce Commission could in some way validate its prior invalid order so as to confer on the Milwaukee Road ownership in or right to retain the impounded monies notwithstanding the terms of the impounding order of June 18, 1956. The Milwaukee Road also argued that the defects of the Interstate Commerce Commission order were "procedural" and that equity required the District Court to set aside the impounding order and to grant the Milwaukee Road rights to the monies.

On February 28, 1958 the District Court denied this motion and required the terms of the June 18, 1956 impounding order to be complied with. (Appendices 2 and 3, pp. 18 *et seq.* below.)

The Milwaukee Road appealed to the Supreme Court from that order and filed an application for supersedeas. The application for supersedeas was denied (*Illinois* v. *United States*, 356 U. S. 906) and the appeal was later dismissed.

The Milwaukee Road, in its application to the Supreme Court for supersedeas both admitted and asserted that the question decided against it was primarily whether the Milwaukee Road could have any interest or ownership in the monies impounded under the impounding order of June 18, 1956.

In its brief in the Supreme Court in support of the application for supersedeas, the Milwaukee Road stated that "the very core of the present appeal [*i.e.* from the order of February 28, 1958] is the ownership of the impounded monies.

That the same question was involved in that appeal as in the present appeal is emphasized by the fact that in its Jurisdictional Statement in the present appeal the Milwaukee Road quotes from the dissenting opinion of the Supreme Court in connection with the denial of supersedeas. The Milwaukee Road thus by its own admission concedes that it is seeking to raise the same questions that were before the Supreme Court in the appeal from the February 28, 1958 order.

There is no difference between the legal question raised with respect to the obligation to refund the impounded monies to commuters applying therefor, and the obligation to apply the balance of the impounded monies to reimburse plaintiffs for their reasonable expenses.

In fact, with the denial of supersedeas the question remaining before the Supreme Court was substantially whether the Milwaukee Road had any rights to that portion of the impounded funds not refunded to commuters and which was to be paid as reimbursement for plaintiffs' expenses.

The Milwaukee Road chose not to prosecute that appeal and on May 12, 1958, it was dismissed for want of prosecution. Thus the decision of the District Court of February 28, 1958, which held that future action of the Interstate Commerce Commission could not give rise to any rights of the Milwaukee Road in the impounded funds inconsistent with the terms of the impounding order, is final.

## II.

## IF RIGHTS TO THE IMPOUNDED FUND WERE OPEN TO QUESTION AT THIS TIME, THE DISTRICT COURT DECISION ENFORCING THE TERMS OF THE IMPOUNDING ORDER SHOULD BE AFFIRMED.

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In its argument that the terms of the impounding order may be set aside, the Milwaukee Road relies on the possibility of a subsequent order of the Interstate Commerce Commission. It sets forth, as Appendix C to its Jurisdictional Statement, the report and order of the Interstate Commerce Commission of October 31, 1958.

As pointed out at page 7 above, that order has been vacated and is of no present effect.

But if the fact were otherwise, the order of the Interstate Commerce Commission entered on October 31, 1958, did not have, and did not purport to have, any retroactive effect. It was based on conditions shown by new evidence offered in 1958, and by its terms, was to be effective on February 6, 1959. The order,—if it had become effective—would not validate or affect the excess fares collected in 1956 and 1957 and impounded pursuant to the impounding order of the District Court of June 18, 1956. The order of the Interstate Commerce Commission could not invalidate the impounding order of the District Court, or free the Milwaukee Road from the obligations imposed upon it by that order as to the disposition of the impounded fund.

## Comment on the Florida and Morgan Cases, Relied Upon by the Milwaukee Road.

The Milwaukee Road relies on *Atlantic Coast Line R. R.* v. *Florida*, 295 U. S. 301 ("the *Florida* case") and *United States* v. *Morgan*, 307 U. S. 183 ("the *Morgan* case") to sustain its argument that the unpaid balance of the impounded fund should be paid over to it.

Those cases were also cited and relied on by the Milwaukee Road in support of its February 1958 motion, asking that it be excused from making the refund to commuters required by the impounding order, and in support of its application for supersedeas on the appeal from the order of February 28, 1958 denying that motion.

The District Court, in entering the order denying the motion, and the Supreme Court, in denying the application for supersedeas, held, in effect, that neither the *Florida* case nor the *Morgan* case supported the contention that subsequent proceedings before the Interstate Commerce Commission could free the Milwaukee Road from the obligation to dispose of the impounded fund as directed by express provision of the impounding order.

But in any event, neither case is in point.

### The Florida Case.

The *Florida* case did not involve the disposition of any fund deposited in court. There was no such fund.

The case involved a suit by certain shippers for restitution of amounts paid for increase in fares authorized by an order of the Interstate Commerce Commission which was held valid by the District Court, but which was ultimately declared invalid by the Supreme Court on appeal.

The Court had before it the question as to whether that which had been lawfully done at the time must be undone.

The *Florida* case has no application to the rights of the commuters to a refund, or to the rights of plaintiffs to receive payment of their expenses, from the impounded fund, as specifically provided in the impounding order.

The only possible application of the *Florida* case in the instant case is in justifying that part of the District Court's order of December 24, 1958, permitting the Milwaukee Road to retain any balance remaining in the fund after completion of the refund to the commuters and payment of plaintiffs' expenses of litigation.

The impounding order makes no specific direction as to disposition of that remaining balance, and the District Court therefore cited the *Florida* case in support of that part of its order permitting the Milwaukee Road to retain it.

With that exception, the *Florida* case has no application here.

### The Morgan Case.

The *Morgan* case (*United States* v. *Morgan*, 307 U. S. 183) is likewise not in point.

In the *Morgan* case the funds in question were impounded subject to further order of Court on final disposition of the case, and without any specific self-executing provision—as in the instant case—for the disposition of the impounded funds or termination of a pending appeal.

Furthermore, as the Court said in the *Morgan* case (p. 188):

> "[The] decision turns on the meaning and application of the provisions of the Packers and Stockyards Act * * *."

The Secretary of Agriculture had, by that act—what the Interstate Commerce Commission does not have—authority to determine reasonable rates in the past for the purpose

of determining what amounts are owed by a carrier to the shipper. As the Interstate Commerce Commission in this case is without authority to enter any further order as to what amounts should have been paid in the past by commuters, the *Morgan* case does not support the Milwaukee Road's motion.

---

We submit that the motion to affirm the order of the District Court, from which this appeal is taken, should be granted.

Respectfully submitted,

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## APPENDIX 1.

IN UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

No. 56-C-681.

MILWAUKEE ROAD'S MOTION FILED FEBRUARY 10, 1958 FOR ORDER DIRECTING CONTINUED IMPOUNDING OF FARES PENDING FURTHER PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

Comes now defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, by Edwin R. Eckersall, E. O. Schiewe, R. K. Merrill, and J. P. Reedy, its Attorneys, and moves this Court to further stay the injunction prescribed by its decree entered June 14, 1956, and to order said defendant to continue the impounding of fares, as is now being done pursuant to this Court's order herein of June 18, 1956, for a period of 120 days or such other reasonable time as may be required, to permit the Interstate Commerce Commission to conduct further proceedings and make supplemental findings not inconsistent with the opinion of the Supreme Court of the United States entered on appeal of this matter, January 13, 1958.

Dated: February 10, 1958.

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## APPENDIX 2.

EXTRACT FROM TRANSCRIPT OF PROCEEDINGS OF HEARING ON FEBRUARY 28, 1958 ON MILWAUKEE ROAD'S MOTION FOR LEAVE TO CONTINUE IMPOUNDING OF FARES, SET FORTH ON THE PRECEDING PAGE IV OF THIS APPENDIX.

* * * * *

Judge Schnackenberg: The members of the Court have read and studied the briefs filed, very exhaustive briefs in this case.

I would like to ask a question. We entered an order on June 18, 1956, providing for the impounding of money constituting the excess, alleged excess, fares to be paid by persons using the Milwaukee Road in suburban service. Was there any objection entered to the entry of that order, or was it an agreed order?

Mr. Guthrie: [For Plaintiff, Milwaukee Road Commuters Assn.] There was no objection. It was an agreed order, your Honor.

Judge Schnackenberg: Is that right, counsel?

Mr. Eckersall: [For Defendant, Milwaukee Road.] That is right, your Honor.

Judge Schnackenberg: That is correct, Mr. Eckersall answered for the railroad.

Mr. Eckersall: Your Honor, as I recall, counsel for plaintiff prepared the order. We had prepared one form of order, and they prepared the form that was entered.

Judge Schnackenberg: The order was entered upon the motion of counsel for the railroad?

Mr. Eckersall: That is correct, sir.

Judge Schnackenberg: The order uses the language that:

> "In the event the decree of this Court is affirmed, the excess fares may be refunded to the persons who paid them."

The Supreme Court of the United States, in its decision of January 13, 1958, page 9 of the printed opinion, states as follows:

> "The judgment of the District Court in remanding the case to the Commission for further consideration must be affirmed."

We have considered all of the arguments, and we are of the opinion that under the law enunciated by the Supreme Court in its decisions, the provisions of the Interstate Commerce Act, and the decree of this Court from which the appeal was taken, which set aside the order of the Commission and remanded the case to the Commission—

> "for further proceedings not inconsistent with the opinion this day filed herein,"

and the opinion of the United States Supreme Court to which I have just alluded, and especially the language of this order, agreed order, entered in this case, providing for the establishment of this fund and stating—

> "that if the decree is affirmed, the Milwaukee Road shall post immediately in its suburban stations notice that refunds will be made of the excess fares to the persons who have paid them,"

and the other provisions of that agreed order providing for the method of repayment, that under all these considerations the motion of the railroad that this fund be not held any longer should be and it is hereby overruled. An order may be prepared accordingly.

* * * * *

Mr. Merrill [also for the Milwaukee Road]: I wonder if I may state what the purpose of that motion was. It was

to continue to impound the fares already collected. I continue to hold them until the Interstate Commerce Commission has acted. We are ready to go back to the level of fares as soon as this Court enters its order. And that is the sole question we have before the bench this morning, as to whether the railroad may continue to hold this money for 120 days, until the Interstate Commerce Commission has a chance to act.

Judge Schnackenberg: No. You should start this afternoon making the refunds, if you are prepared to operate that fast. You should put up the notice today. I presume you have it already printed. You should put it up in all your suburban stations that the refunds will be made of the excess fares to the persons who paid them.

* * * * *

## APPENDIX 3.

In United States District Court,
Northern District of Illinois,
Eastern Division.

No. 56-C-681.

ORDER ENTERED FEBRUARY 28, 1958 DENYING MOTION FOR LEAVE TO CONTINUE IMPOUNDING OF FARES, SET FORTH AT PAGE IV OF THIS APPENDIX.

This cause coming on to be heard on motion of Chicago, Milwaukee, St. Paul and Pacific Railroad Company (herein referred to as "the Milwaukee Road") one of the defendants herein, for the entry of an order staying the injunction prescribed by decree of this Court entered June 14, 1956 and ordering the Milwaukee Road to continue the impounding of fares in the manner provided for in this Court's order entered June 18, 1956, and the Court having received the briefs and heard the arguments of counsel and being fully advised in the premises,

It is ordered:

The motion of the Milwaukee Road for an order staying the injunction prescribed by decree of this Court entered June 14, 1956, and ordering the Milwaukee Road to continue impounding of fares in the manner provided for in the order of this Court entered June 18, 1956, is denied.

Enter:

Elmer J. Schnackenberg,
*Circuit Judge.*

Philip L. Sullivan,
*Judge.*

Walter J. LaBuy,
*Judge*

Dated: February 28, 1958.